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No. 07-422

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In The Supreme Court of the United States

TEMPLE UNIVERSITY HOSPITAL,

Petitioner,

v.

HUGH B. GALLAGHER, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH OFFICE

BRIEF IN OPPOSITION

Shanin Specter
Counsel of Record
Andrew S. Youman
Charles L. Becker
KLINE & SPECTER,
A PROFESSIONAL CORPORATION
1525 Locust Street, 19th Floor
Philadelphia, Pennsylvania 19102
(215) 771-1000

Counsel for Respondents

THE LEX GROUP^{DC} • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction under *Michigan v. Long*, 463 U.S. 1032 (1983), where the Pennsylvania courts affirmed a compensatory damages judgment on state-law grounds that are adequate and independent of federal law?

2. Whether the principles enunciated in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), are even implicated when (a) evidence regarding a defendant's post-malpractice effort to alter and conceal medical records is admitted without objection and the evidence is relevant to negligence and causation, (b) no evidence is admitted during trial regarding the defendant's conduct toward non-parties, (c) the jury unanimously awards compensatory damages in an amount significantly less than the evidence would have permitted, and (d) in the second phase of a bifurcated trial, the jury awards only $15,000 in punitive damages, a judgment later reversed by the Pennsylvania courts under Pennsylvania law?

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INTRODUCTION

The writ of certiorari is reserved for those cases that involve fundamental or urgent issues of federal law. This petition presents neither. It does not even present an issue of federal law. Rather, it represents the latest chapter in a tortfeasor's effort to postpone responsibility for its neglect that caused a catastrophic brain injury to a college student. Rather than accepting that the large compensatory verdict was a function of its proven neglect and the devastating injuries suffered by Hugh Gallagher, IV, Temple University Hospital ("Temple") now supposes that the verdict must in actuality have represented an improper award of punitive damages. Temple's latest effort to manufacture appellate issues should be rejected and the petition denied.

In fact, the jury did assess $15,000 in punitive damages against Temple in a second phase of trial for Temple's post-malpractice efforts to alter key medical records and then hide those records until trial. On appeal, however, the Pennsylvania Superior Court reversed the punitive damages judgment under the Pennsylvania law that a post-incident cover-up does not give rise to a claim for punitive damages. At the same time, the Superior Court affirmed the compensatory judgment because, *inter alia*, all evidence related to the altering and hiding of records had been properly admitted without objection *before* Plaintiffs sought leave to amend their complaint to plead punitive damages. The Superior Court twice affirmed the compensatory verdict under Pennsylvania law. The Pennsylvania Supreme Court twice declined to alter those rulings.

Temple now seeks to characterize this case as involving multiple issues of federal constitutional law – it says the allowance of the punitive damages claim violated this Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and hence a "structural error" occurred mandating a new trial under *Arizona v. Fulminante*, 499 U.S. 279, 306-08 (1991), and otherwise the Superior Court misapprehended the proper method for evaluating trial error. These arguments mistake the holdings in these cases in an effort to manufacture constitutional issues. An analysis of what this Court actually held in those cases, in the context of what actually occurred below, demonstrates that the petition lacks merit and should be denied.

STATEMENT OF THE CASE

A. Temple's neglect caused a catastrophic brain injury.

This is a medical malpractice case arising out of care provided to Hugh Gallagher, IV, then aged 19, in the Temple University Hospital Burn Intensive Care Unit (BICU) on June 7, 2000. Hugh had been a student at the University of Pennsylvania and had intended to pursue a career in medicine. Pennsylvania Superior Court Joint Reproduced Record ("Pa. Rec.") 637-38, 938. During his summer break, he suffered severe burns in an apparent suicide attempt and was admitted to the BICU for treatment. Hugh had a tracheotomy in place because he was having difficulty breathing independently and was at risk for airway compromise from a mucous or blood clot. Pa. Rec.

116-17. The nurses responsible for Hugh knew that he was at risk for airway compromise, and that Hugh required suctioning at least every hour and as needed to ensure that he had a functioning airway. Pa. Rec. 116-17, 926-28.

Because of his risk for airway compromise, Hugh received "one-to-one" nursing care, meaning that the nurse responsible for Hugh was assigned solely to him and had no other patient responsibilities. Pa. Rec. 113-15. On June 7, 2000, that one to one nurse was Janice Lawson. *Id.* The two other nurses on duty that night were responsible for the only three other patients in the unit. *Id.*

At approximately 11:40 p.m., Hugh's airway became plugged and he was unable to breathe. His vital signs began to decline, causing his alarms to sound both in Hugh's room and out at the BICU's central nurse's station. Pa. Rec. 116-18, 191-98. Despite the facts that Hugh had a one-to-one nurse solely responsible for him, and that the two other nurses on the unit were responsible for only three other patients, nobody responded to Hugh's alarms for a period of four to ten minutes. Pa. Rec. 506-08, 924. During that time, Hugh was unable to breathe due to the blockage of his airway.

At trial, Temple would attempt to explain the failure of the nurses to respond to Hugh's alarms by claiming that there were critical patient emergencies occurring in nearby rooms in the unit such that they did not know that Hugh's alarms were sounding. Pa. Rec. 915-19. The records of the patients in these rooms showed that no emergencies had occurred.

Pa. Rec. 165-67, 285-86, 494-98. The only life-threatening event to occur that night was Hugh Gallagher's blocked airway. Pa. Rec. 497-98.

By the time Hugh was discovered, he was pale, had no heart rate and was not breathing. Pa. Rec. 241-42. Although he was ultimately resuscitated, he suffered a severe anoxic brain injury as a result of the delay in responding to his alarms. Pa. Rec. 506-09.

Hugh has been institutionalized since that day. He cannot live independently. He cannot accurately recite the day of the week. His cognitive and memory deficits are so severe that he will never be able to hold a job and will always require the care of others. He has significant gait and balance dysfunction and other physical injuries as a result of his brain injury. Pa. Rec. 551-52, 564-70, 703-04. No compensation was sought for his burns, from which he has recovered.

B. The resulting compensatory damages.

The brain injury caused by Temple's negligence resulted in a substantial compensatory damages verdict because the jury heard undisputed evidence that Hugh Gallagher will have to live in a supervised setting and receive medical care for the rest of his life and because of his resulting loss of earnings and earnings capacity. The economic damages alone were as high as $27,387,920. These economic damages were divided into three categories: 1) past medical expenses; 2) future

medical and custodial expenses; and 3) loss of earnings and earning capacity.

Past medical expenses totaling $600,000 were stipulated. Pa. Rec. 767-68. As to future medical and custodial care, an economist and life care planner gave uncontested testimony that the costs of such future care would be as much as $12,933,159. Pa. Rec. 587-88; 737-38. Hence the uncontested economic damages exceeded $13,500,000.

The only contested element of economic damages was loss of earnings and earning capacity. The disagreement had to do with what level of education and training Hugh Gallagher would have been able to achieve given his emotional difficulties prior to his brain injury. It was undisputed that Hugh had graduated from St. Joseph's Preparatory School with a cumulative grade point average of 3.55 and had completed his first year of college at the University of Pennsylvania. Pa. Rec. 885-86. Hugh wanted to go to medical school after graduating from Penn and become a neurosurgeon, an intention that was documented on Hugh's SAT records. Pa. Rec. 637-38, 771. Plaintiffs' economist testified that Hugh's loss of future earning capacity (wages plus fringe benefits) ranged from $3,228,413 (college graduate) to $13,854,761 (neurosurgeon) depending upon his ultimate level of achievement. Pa. Rec. 727-36.

Of course, the jury also was to consider damages for intangibles such as pain and suffering, loss of life's pleasures, and disfigurement. As to these elements, there was significant testimony by

Hugh and by Plaintiffs' experts showing the horrific effect that the June 7 anoxic event had on Hugh's life. Pa. Rec. 546-91, 691-707.

C. Temple's attempt to alter and conceal key evidence was discovered at trial.

After the malpractice occurred, Temple personnel altered and concealed crucial medical records that documented what happened to Hugh on June 7.

First, Nurse Lawson used white-out on Hugh's original flowsheet (documenting his vital signs) to obliterate and alter data that detailed the events of her discovery of Hugh and the resulting code. For example, Nurse Lawson acknowledged at trial that she substituted a heart rate of 38 for a time at which the original flowsheet reflected that Hugh's heart rate was zero. Pa. Rec. 205-12, 267-70. In her effort to re-portray the timing of what had occurred, she obliterated not one but seven separate entries in the flowsheet. *Id.* Even Temple's nursing expert testified that it was illegal to white-out records in the manner done by Nurse Lawson. Pa. Rec. 943-44.

Second, Nurse Lawson permitted the destruction of key data from Hugh's room monitor by failing to print out the data in a timely fashion. This room monitor contained a minute-by-minute account of Hugh's vital signs and would have provided the best evidence of what had occurred during the critical time period. Because Nurse Lawson neither printed this stored data nor documented it in Hugh's chart, the data was lost and the Gallaghers were

deprived of the means to conclusively disprove the version of events created with white out by Nurse Lawson. Pa. Rec. 234-25, 263.

Third, Temple's nursing supervisor removed Hugh's original flowsheet (now altered by white-out) from his medical chart and put the original in a sealed envelope in a drawer in the risk manager's office. Pa. Rec. 408. This was the only document from the foot-thick chart to be removed by Temple management. Pa. Rec. 402-03. The risk manager replaced the original record with a photocopy. Pa. Rec. 399-400. Because the white-out had been used in a careful manner, it was impossible to tell from the photocopy that the original had been altered. Pa. Rec. 1592.

Fourth, Temple provided the photocopy (not the original) to Plaintiffs' counsel during discovery. Temple then claimed on six separate occasions over the next three years that the original could not be found. Pa. Rec. 203, 234-35, 408-10. Temple's risk manager knew she had the original flowsheet throughout the litigation. Pa. Rec. 402-09.

Fifth, Temple personnel told the Gallaghers and the court that no alterations had been made in the medical records. When Nurse Lawson was deposed, she testified under oath that she had not altered any entries in the medical records. Without the benefit of the original flowsheet, the Gallaghers were in no position to challenge this testimony. Nurse Lawson would later acknowledge at trial that her deposition testimony was false. Pa. Rec. 205-12, 267-70.

Sixth, Temple attempted to conceal the existence of the original flowsheet not only from Plaintiffs' counsel but also from its own counsel. When asked about the whereabouts of the original flowsheet by defense counsel, Temple risk management falsely informed its own counsel that it could not find the flowsheet even though the risk manager knew she had the record all along. Pa. Rec. 447-48.

Seventh, when the risk manager removed the original flowsheet from the chart, she placed a post-it note in the original chart stating that the original flowsheet was in her office. Pa. Rec. 400. However, every time the chart was produced for deposition or photocopied for production to plaintiffs, the post-it note was removed from the original chart by Temple so that Plaintiffs would not see it and become aware that the original flowsheet existed and was located in the risk management office. Pa. Rec. 1594-95; 946-49. The post-it note was revealed at trial on a photocopy of the chart sent to a Temple expert witness. Pa. Rec. 946-49.

As a result of the foregoing conduct, it was not until the first day of trial that the Gallaghers became aware that white-out had been used by Nurse Lawson to alter the original record. It was not until the second day of trial that the Gallaghers became aware that the original flowsheet had been in the custody of Temple risk management all along.

Significantly, all of the testimony regarding these issues came into evidence without objection by

the defense and before Plaintiffs requested that the complaint be amended to allege punitive damages. The evidence was properly admitted because it was relevant to negligence and causation, as it explained why Plaintiffs were unable to show an exact time line surrounding the oxygen deprivation suffered by Hugh. Appendix ("App.) 9a, 20a. It was also relevant to spoliation and provided the foundation for the "adverse inference" charge that the trial judge would give the jury, advising them that the jury could assume for purposes of their deliberations that the altered entries and lost data would have contained information unfavorable to Temple. App. 34a.

Only after all of this evidence had been admitted, without objection, was a request for amendment to plead a punitive damage claim made and granted. Not a single piece of additional evidence was admitted as a result of the allowance of the punitive damages claim. Consistent with *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984), the trial court bifurcated the case so that the jury would not hear evidence of Temple's net worth in the compensatory phase and would consider imposing punitive damages only if a predicate question were answered in the affirmative.

D. The jury instructions and closing speeches.

At the close of the trial's first phase, the jury was given a verdict slip that contained four questions. Pa. Rec. 1382-83. Questions 1 and 2 required the jury to assess breach of duty, causation,

and the existence of compensatory damages. Question 3 asked the jury to state the amount of compensatory damages sustained "as a result of the negligence of Temple University Hospital." (*Id.*) Only after the jury had awarded compensatory damages was the jury to answer Question 4, the threshold question on punitive liability: "Was the conduct of Temple University Hospital willful or wanton or with reckless indifference to the rights of Hugh Gallagher, IV?" *Id.* The verdict slip did not ask the jury to punish Temple.

Significantly, the trial court did not give general instructions applicable to punitive liability and the jury was never advised that Question No. 4 was a predicate for assessment of punitive damages. Instead, the judge instructed them only regarding the elements of compensatory damages they were to consider. He stated that the jury was only to award compensatory damages sustained as a result of Temple's negligence. Pa. Rec. 1274-77, 1290-91, 1392-93. He specifically instructed the jury that they were not there to punish anyone. Pa. Rec. 1270, 1285.

During his closing speech, Plaintiffs' counsel presented an argument based upon the evidence and the reasonable inferences to be drawn from the evidence. Regarding the evidence showing Temple's effort to alter and conceal crucial medical records, it was essential that Plaintiffs' counsel address this evidence so that the jury would understand why Plaintiffs could not demonstrate the precise timing of Hugh's code and Temple's inadequate response. Plaintiffs' counsel argued as follows:

> How do we know that they did the wrong thing separate and apart from the records themselves? Their conduct. Their conduct. 450 years ago a fellow in England named Shakespeare wrote that the guilty flee when no one pursues. He wrote Oh, what a tangled web we weave when first we try to deceive. Is that what happened here? Yes, it is . . . . Now, what was the exact timing here? I should be able to tell you that because that's part of my burden, but I can't tell you the exact timing and I regret that. But that's not my fault. Because they destroyed the information.

Pa. Rec. 1173-75. This argument was proper because the cover-up evidence was relevant to negligence and causation and to the spoliation instruction that permitted the jury to make an adverse inference from Temple's actions. In any event, Temple did not object.

Temple now argues that Plaintiffs "repeatedly commingled the negligence and punitive damages issues" in the closing speeches. Certiorari Petition ("Cert. Pet.") 7. In fact, there was not any "commingling" because all of the evidence introduced before the jury was relevant to negligence and causation. Further, the jury never was instructed on punitive damages and instead was specifically instructed only to determine compensatory damages.

Temple now also complains that Plaintiffs' counsel used the phrase "cover-up" in his closing speech. Cert. Pet. 7. That phrase represented a fair characterization of Nurse Lawson's use of white-out to change multiple entries in the medical record, of the risk manager's conduct in removing the original record and replacing it with a photocopy that concealed the alteration, and of Temple's failure to disclose the original document during years of litigation until compelled to do so at trial. In any event, Temple's counsel did not object to the statement and therefore waived any complaint based upon it. Pa. Rec. 1175.

E. The jury found negligence and awarded compensatory damages.

The jury returned a unanimous verdict that Temple had committed negligence in caring for Hugh and awarded $20 million in compensatory damages. This amount was $7 million less than the evidence of economic damages alone supported, not counting the pain and suffering and other intangible damages that the jury also considered.

The jury also answered "Yes" to Question No. 4 on whether Temple had committed willful, wanton or reckless conduct, the predicate to further consideration of punitive liability and damages. When the jurors were polled, all stated their agreement with the verdict and the verdict was recorded. Pa. Rec. 1314-17.

The trial court instructed the jury that they should return the following Monday to assess

punitive damages and was ready to excuse them when one of the jurors raised her hand and uttered the following: "I think the verdict that we came to, because we half on one and half on the other, the question –." Pa. Rec. 1317-18. When it became apparent that the juror may have been speaking about the jury's deliberations, the trial court interrupted the juror and instructed the jury to return on Monday. Pa. Rec. 1318-19.

As the Pennsylvania Superior Court later explained, the judge's action was proper because the verdict was unanimous, there had been no evidence of juror confusion, and Pennsylvania law does not permit a trial court to inquire into the jury's deliberative process under those circumstances. App. 24a. The Superior Court rejected Temple's "self-serving interpretation" about the juror's utterance and noted that the utterance "at best is ambiguous and could have just as easily have been interpreted to indicate that the jury had difficulty in reaching a consensus on liability or the amount of compensatory damages. In any event, the deliberative process is not to be inquired into in the absence of evidence of clear confusion." *Id.*

In its certiorari petition, Temple incorrectly says that a juror asked to speak with the judge privately following the verdict and the judge denied the request. Cert. Pet. 9. In fact, the juror in question asked to speak with the judge before the verdict, not afterwards. Pa. Rec. 1343. Temple has made this misstatement on multiple occasions, and repeatedly has been corrected.

F. The jury awarded punitive damages in the second phase of trial.

The jury returned the following week to hear evidence as to Temple's net worth and to decide whether to award punitive damages and the amount of any such award. Before deliberating, the jury was instructed both by the trial court and by Plaintiffs' counsel that they were free to award zero dollars if they chose. Pa. Rec. 1366, 1373. Temple's counsel told the jurors in his speech that awarding punitive damages would not punish Temple, but would only punish the North Philadelphia community that Temple serves. Pa. Rec. 1371-72. After deliberations, the jury awarded $15,000 in punitive damages. Pa. Rec. 1375-76.

Temple's certiorari petition mischaracterizes the record by stating that "[t]he jury found petitioner liable for negligence, decided that punitive damages were warranted, and awarded $20 million in damages." Cert. Pet. 1. As made clear above, the actual course of events was somewhat different. The jury initially found that Temple negligently caused Hugh Gallagher's injuries and awarded $20 million in compensatory damages. Only thereafter did the jury reach Question No. 4, the predicate question to finding punitive liability and damages. In answering "yes" to that question, the jury did not directly address the issue of punitive damages let alone find that they were warranted. At no time was the jury asked to determine whether "punitive damages were warranted." Rather, the jury did not actually decide that punitive damages were warranted until it imposed them.

In a similar vein, the petition later states the jury initially decided whether Temple's conduct was "so reprehensible as to warrant punitive damages." Cert. Pet. 2. The jury never decided any such question during its initial deliberations, only Question No. 4 as stated. This subtle mischaracterization of the trial proceedings represents another effort to reinvent what actually happened.

G. Further misrepresentations to this Court: the stricken affidavits.

Following the verdict, attorneys for Temple's excess insurance carrier conducted *ex parte* interrogations of at least two of the jurors. Temple received no permission from the trial judge to conduct these interrogations. Plaintiffs' counsel were not present or invited. The claimed product of these interrogations is two affidavits from the excess carrier's attorneys – not the jurors – who claim to have conducted the interrogations. The affidavits purported to paraphrase information supposedly given by these jurors in response to unknown questions. App. 26a. However, the affidavits were obtained in clear violation of Pennsylvania law and their content was inadmissible hearsay. In fact, the affidavits were so improper that when the trial court confronted Temple's counsel with the impropriety of Temple's conduct in obtaining them, he agreed that the affidavits should be struck from the record. He stated: "We don't need to get to the affidavits at all. If you want to remove the affidavits from the brief, it's okay with me . . . ." *Id.* The trial judge struck

the affidavits, and the Superior Court held that Temple could not base any argument on them. *Id.*

Improperly, Temple continues to present argument based upon these affidavits. Cert. Pet. 9. Since Temple continues to reference non-record material, it should be noted that Temple's assertion that one of the affidavits came from a juror is absolutely false. Both affidavits are from the excess carrier's attorneys. *Id.* Further, the characterization of the judge as "refusing" to consider the affidavits is belied by the fact that Temple's own counsel agreed that the affidavits should be struck from the record. *Id.* In view of Temple's other mischaracterizations in this certiorari petition, Temple's misrepresentations to the Court regarding the affidavits raise unfortunate concerns about candor to the Court and underscore the reasons that certiorari should be denied.

H. The appellate process.

After the trial court affirmed the verdict in all respects, the Superior Court, in an unpublished opinion, reversed the judgment for punitive damages under the Pennsylvania law that the right to punitive damages is "a mere incident to a cause of action" and that punitive damages could only be based on the subject matter of the action, not on a post-incident cover-up. App. 18a-19a. The Superior Court established Pennsylvania law by citing *Weider v. Hoffman*, 238 F. Supp. 437 (W.D. Pa. 1965), in which a federal district court described Pennsylvania law on the availability of punitive damages and quoted the Pennsylvania Supreme Court's decision

in *Hilbert v. Roth*, 149 A.2d 648, 652 (Pa. 1959). The Superior Court then cited the Pennsylvania statute providing for punitive damages in medical malpractice cases, 40 P.S. § 1303.505(a), and the common-law principles summarized in Restatement (Second) of Torts § 902 to further establish Pennsylvania's requirement that punitive damages must be based upon the underlying cause of action. App. 19a.

The Superior Court affirmed the compensatory award under Pennsylvania law as well. In particular, the Court rejected Temple's claim of prejudice on grounds that "all of the evidence concerning the alleged cover up, which Appellant now complains tainted the jury, was relevant to liability and was admitted without objection by Appellant before the Appellees orally requested an amendment of the complaint to include a claim for punitive damages." App. 20a. The Superior Court added that because the trial judge bifurcated the trial, no evidence of Temple's net worth or other evidence solely relevant to punitive damages was heard by the jury in the compensatory phase, and that the verdict, "while significant, was still seven million dollars less than the asserted economic damages submitted into evidence by the Appellees." App. 20a-21a.

Temple appealed to the Pennsylvania Supreme Court, which entered an Order remanding the case to the Superior Court "with instructions to review the record and reconsider whether Petitioner has demonstrated that it has suffered prejudice from the trial court's error." App. 11a. After receiving

additional briefs from the parties, the Superior Court, in another unpublished opinion, again affirmed the judgment on compensatory damages, explaining that there was no prejudice and no improper "intertwining" of compensatory and punitive damages given (1) the absence of any evidence solely relevant to punitive damages, (2) the jury instructions that focused solely on compensatory damages, (3) the absence of any reference to "punishment" or "punitive damages" in either closing speeches or the verdict slip, and (4) the verdict for an amount substantially less than would have been supported by the evidence. App. 6a-9a.

Temple again petitioned the Pennsylvania Supreme Court for allowance of appeal. The Pennsylvania Supreme Court denied Temple's petition on June 28, 2007, and this petition ensued.

REASONS THE WRIT SHOULD BE DENIED

I. This Court lacks jurisdiction under the principles enunciated in *Michigan v. Long*.

This Court long has held that it will not consider an issue of federal law on review from a judgment of a state court if the judgment rests on a state-law ground that is independent of the federal issue and provides an adequate basis for the court's decision. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). This jurisdictional principle is grounded in respect for the independence of state courts and the desire to avoid rendering advisory opinions. *See id.*; *Harris v. Reed*, 489 U.S. 255, 260 (1989). Here,

Temple claims that a constitutional error occurred when the trial court allowed the jury to hear evidence of Temple's post-malpractice conduct and allowed a punitive damages claim on the basis of that evidence. The Superior Court analyzed and decided that claim under state law principles that are wholly independent of federal constitutional law. App. 2a, 13a. Because those grounds are adequate and independent of federal law, certiorari should be denied.

The Superior Court's decision that the evidence was properly allowed was based entirely on state law: the evidence was relevant to negligence and causation and it came in without objection, causing the waiver of any subsequent objection Temple might have wished to interpose. App. 9a, 20a.

The Superior Court also disallowed the punitive damages claim on state law principles. Pennsylvania law provides that "no award for punitive damages may be made where actual damage has not been suffered." *Hilbert v. Roth*, 149 A.2d 648, 652 (Pa. 1959). Accordingly, "[t]he right to punitive damages is a mere incident to a cause of action – an element which the jury may consider in making its determination – and not the subject (matter) of the action in itself." *Id.* The Superior Court invoked those principles by citing *Weider*, in which a federal court, exercising diversity jurisdiction, discussed Pennsylvania's law on punitive damages and quoted the above passage from *Hilbert*. App. 19a. The Superior Court also relied on the Pennsylvania statute governing the

allowance of punitive damages claims in medical malpractice actions. *See* 40 P.S. § 1303.505(a). It additionally relied on the Restatement (Second) of Torts § 902, which summarized the common-law principle that damages must flow from the injury giving rise to the claim. The entire analysis flowed from state-law principles.

As the Superior Court did not apply federal law in reaching this decision, either explicitly or implicitly, there was no reason for the Court to specifically state that it based its decision on state law. No ambiguity about the basis for the Superior Court's decision can be inferred under these circumstances, and Temple's contrary suggestion is without merit. Cert. Pet. 12.

Temple proposes an alternate reality where the Superior Court's opinion "recognized that the punitive damages claim could not pass muster under *State Farm*" (referring to *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003))." Cert. Pet. 1, 12. This argument is wrong on its face. The best evidence of what the Superior Court "recognized" is the opinion itself, which neither mentioned *State Farm* nor discussed any of the concepts that have been explored in this Court's punitive damages jurisprudence. Further, the issues addressed in *State Farm* – the admissibility of a defendant's out-of-state conduct against non-parties when determining the amount of punitive damages, and the constitutionally-permitted amount of a punitive damages verdict relative to an underlying compensatory damages verdict – were not even present in this case. *State Farm*, 538 U.S. at 422-23.

The sole basis for Temple's assertion is that a passage of the Superior Court's opinion uses language that looks similar to language used in *State Farm*. Cert. Pet. 12. This is a frivolous effort to fabricate a constitutional basis for the Superior Court's decision. As noted above, the Superior Court was dealing with a defendant's post-malpractice attempt to conceal and alter the evidence of its malpractice. It was not dealing with a defendant's conduct against non-parties, and certainly not a grossly excessive punitive damages award relative to compensatory damages. *State Farm* was not the unstated basis for the Superior Court's decision.

Federal law was also absent from the Superior Court's decision that Temple suffered no prejudice from any purported error. The Superior Court noted that all of the evidence about which Temple complained was relevant to negligence and causation, and admitted *without Temple's objection* before Plaintiffs sought to add punitive damages; hence the evidence was properly admitted and Temple waived any contrary argument. App. 20a. In addition, because the trial court bifurcated the trial to assure that evidence of Temple's net worth would not be admitted, "the jury did not hear any evidence in the compensatory phase that they would not have otherwise heard had there been no punitive damages claim." *Id.* "Furthermore, the amount of the compensatory damages, while significant, was still seven million dollars less than the asserted economic damages submitted into evidence by the Appellees." *Id.* 20a-21a.

Federal law was likewise absent when the Court rejected Temple's "jury investigation" argument because Pennsylvania law provides that verdicts may not be investigated absent clear evidence of jury confusion, *see Drum v. Shaull Equipment and Supply Co.*, 787 A.2d 1050 (Pa. Super. 2001), and no such confusion existed in this case given the unanimous verdict and the fact that the jurors were individually polled. App. 25a. The Court then found that Temple had waived any argument based on affidavits secured from lawyers for Temple's excess carrier because Temple had consented to the striking of those affidavits, which were inadmissible in any event under the Pennsylvania Rules of Evidence. App. 26a.

In summary, there is not a whiff of federal law in the Superior Court's opinion affirming the compensatory damages verdict. This Court should decline jurisdiction under *Michigan v. Long*.

II. No *State Farm* violation occurred when the punitive damages claim was allowed.

Temple's central premise is that the allowance of the punitive damages claim was "constitutionally invalid" under *State Farm*. Cert. Pet. 1, 12. Temple is wrong. *State Farm* deals with whether evidence of a defendant's conduct toward non-parties is admissible in determining the amount of punitive damages, and the constitutionally permitted relationship between the amount of punitive damages and the underlying compensatory verdict. *State Farm*, 538 U.S. at 423-25. It has nothing to do with whether a defendant can be subject to punitive

damages for its post-malpractice efforts to conceal the evidence of its malpractice.

State Farm's factual and procedural history confirms this point. In *State Farm*, insureds brought an action in Utah against an automobile liability insurer for its refusal to settle a wrongful death suit. The plaintiffs asserted claims for bad faith refusal to settle, fraud, and intentional infliction of emotional distress. They sought both compensatory and punitive damages. Before trial, State Farm moved *in limine* to exclude evidence of alleged conduct that occurred in unrelated cases toward unrelated persons outside of Utah. The trial court denied the motion, reasoning that such evidence was admissible to determine whether State Farm's conduct was intentional and sufficiently egregious to warrant imposition of punitive damages. The trial court also ordered a bifurcated trial. The first phase only decided whether State Farm committed bad faith by unreasonably refusing to settle the case. The second phase determined the plaintiffs' claims for fraud and intentional infliction of emotional distress, their compensatory damages, and the issues of punitive liability and damages. *See id.* at 413-16.

It is worth repeating that last sentence to emphasize why *State Farm* does not prohibit what happened here. In *State Farm*, the second phase of trial determined plaintiffs' claims for fraud and intentional infliction of emotional distress, *their compensatory damages, and the issues of punitive liability and damages*. In other words, what happened in *State Farm* is exactly what Temple says is unconstitutional under *State Farm*. Had this

Court felt that that the Due Process clause mandated a complete bifurcation of compensatory damages issues from punitive liability issues, the Court would surely have said so. Instead, the Court said nothing on that topic and focused its attention on other matters. *State Farm* itself provides the best evidence against Temple's use of *State Farm* in this case.

In any event, during the second phase of the *State Farm* trial, plaintiffs admitted evidence pertaining to State Farm's practices over 20 years in numerous states against numerous persons. *See id.* Most of the practices bore no relation to the automobile insurance policy at issue in the case. As this Court would explain, the *State Farm* trial "was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country." *Id.* at 420. After the second phase, the jury awarded $2.6 million in compensatory damages and $145 million in punitive damages. *See id.* at 415.

The issue raised by this massive punitive damages verdict relative to compensatory damages was the scope of procedural and substantive limitations on punitive damage awards imposed by the Due Process Clause and the Fourteenth Amendment. *See id.* at 416. Building principally on this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court reversed the $145 million punitive damages award on grounds that it amounted to an arbitrary and unreasonable deprivation of property. The Court explained that a State cannot punish a defendant for out-of-state

conduct against non-parties and that only conduct with a "nexus to the specific harm suffered by the plaintiff" could form the basis for punitive damages. *Id.* at 422-23. "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." *Id.* Absent this limitation, defendants would be subject to multiple punitive damages awards for the same conduct. *See id.* In addition, while no bright-line can be imposed regarding the permitted ratio of punitive to compensatory damages, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." *Id.* at 425. Central to the Court's analysis was the notion that a person should receive "fair notice" of the conduct that will subject him to punitive damages and of the severity of the penalty that a State may impose. *Id.* at 417.

State Farm and its progeny, most recently this Court's decision in *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (U.S. 2007), provide a constitutional framework for determining the admissibility of evidence of a defendant's conduct toward non-parties and the permitted relationship between punitive and compensatory damages to avoid grossly excessive or arbitrary punitive damage awards. That framework has no relevance to this case, which does not involve Temple's conduct toward non-parties of any kind. The instant case does not even raise a *State Farm* issue, let alone involve a *State Farm* violation.

III. No constitutional error, let alone a "structural error," occurred when the jury was permitted to hear evidence and argument regarding Temple's post-malpractice conduct.

Temple next argues that allowing the jury to hear evidence and argument regarding Temple's post-malpractice conduct (a purported *State Farm* error) amounted to a "structural error" mandating a new trial under this Court's decisions in *Chapman v. California*, 386 U.S. 18, 21-22 (1967), and *Arizona v. Fulminante*, 499 U.S. 279, 306-08 (1991). Cert. Pet. 12-13. This argument is wrong for multiple reasons.

By way of background, *Chapman* and *Fulminante* are seminal cases regarding the review of constitutional errors that occur during trial, primarily in criminal cases. In *Chapman*, this Court held that a constitutional error occurring in a criminal trial did not automatically require reversal of the verdict; instead, such error may be held harmless if the court concludes that the error "was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 21-22, 24. In *Fulminante*, this Court characterized the constitutional errors subject to *Chapman* review as "trial errors" – errors that occur during the presentation of the case to the jury and that "may therefore be quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless." *Fulminante*, 499 U.S. 306-10. The Court distinguished "trial errors" from those constitutional mistakes that cause a "structural defect in the constitution of the trial mechanism." *Id.* at 310.

These structural errors are not subject to harmless error review; they are harmful *per se* and mandate reversal of the verdict. *See id.*

Fulminante did not define what amounts to a "structural error," but it provided several examples: the total deprivation of the right to counsel at trial, *see Gideon v. Wainwright*, 372 U.S. 335 (1963), a biased judge, *see Tumey v. Ohio*, 273 U.S. 510 (1927), the unlawful exclusion of members of a defendant's race from a grand jury, *see Vasquez v. Hillery*, 474 U.S. 254 (1986), and the right to a public trial, *see Waller v. Georgia*, 467 U.S. 39 (1984). *Fulminante* explained that "[w]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Fulminante*, 499 U.S. at 310.

Here, Temple suggests that a "structural error" occurred when the jury was permitted to consider whether Temple's post-malpractice actions amounted to willful, wanton or reckless conduct. "It is simply impossible," Temple argues, for a jury to decide issues of liability and compensatory damages and not be impacted by evidence relevant to punitive damages. Cert. Pet. 13. This statement requires several responses.

First, the suggestion that this case involved a constitutional disaster akin to the examples provided in *Fulminante* reflects a total lack of perspective on what is fundamental in our constitutional system. Due Process is not violated when admissible evidence is admitted without objection. Even if some

theoretical Due Process violation occurred, the error is a classic "trial error" and not equivalent in constitutional magnitude to a deprivation of the right to counsel, or being forced to try a case before a biased judge, or a deprivation of a public trial.

Second, in any event, no *State Farm* violation could conceivably have occurred during the compensatory trial because none of the indicia of a *State Farm* violation were even present. Evidence about Temple's post-malpractice conduct in the instant case was properly admitted without objection because it was relevant to Plaintiffs' ability to carry their burden or proof and to demonstrate spoliation. Further, (1) the jury was never instructed on punitive liability; (2) the jury was never asked on the verdict slip whether Temple was should be punished for its actions; (3) in fact, the jury was specifically instructed that its job was only to determine negligence and compensatory damages, that it was not to punish anyone, and that it was entitled to make an adverse inference from Temple's concealment and alteration of crucial evidence; (4) Plaintiffs' counsel was entitled to discuss all properly admitted evidence at closing argument; and (5) Question No. 4 was asked without reference to the question as a predicate for a later determination of punitive damages.

Third, bifurcation of trials is a well-established and flexible procedure that has never been viewed as raising federal constitutional questions in either state of federal courts. It should be noted that while Temple cites eight state statutes when discussing bifurcation, only the Mississippi

statute actually mandates the complete bifurcation of compensatory and punitive issues. Cert. Pet. 13. The Arkansas, Minnesota, North Carolina, New Jersey, and North Dakota statutes require bifurcation only if a party requests it. *Id.* Temple mischaracterizes the Virginia statute, which applies only in asbestos cases and does not even provide for bifurcation upon a party's request. *Id.* Moreover, Temple ignores seven other statutes that specifically provide for a procedure along the lines of what occurred in the instant case: punitive liability to be tried along with compensatory damages and for a separate proceeding only to determine the *amount* of punitive damages (so that net worth evidence will not be heard by the jury in the compensatory phase). *See* Tex. Civ. Prac. & Rem. § 41.009; Ala. Code § 6-11-23; Ga. Code Ann. § 51-12-5.1; Kan. Stat. Ann. § 60-2702; Mo. Ann. Stat. § 510.263; Mont. Code Ann. § 27-1-221; Nev. Rev. Stat. § 42.005. Many statutes addressing punitive damages do not provide for any bifurcation whatsoever. *See, e.g.*, Cal. Civ. § 3294; Col. Rev. Stat. § 13-21-102; Idaho Code § 6-1604; Iowa Code § 668A.1; Ind. Code. § 34-51-3-3; Ky. Rev. Stat. Ann. § 411.186; La. Civ. Code Ann., art. 3546; S.C. Code Ann. § 15-33-135. This diversity of approaches forecloses Temple's suggestion that the federal constitution permits only one way of handling punitive damages, as does the total absence of jurisprudence discussing these various approaches in a constitutional framework.

Fourth, the law review articles cited by Temple underscore the lack of constitutional dimension to the trial judge's decisions in this case. Cert. Pet. 14. These articles focus on the effect of

introducing net worth evidence or other evidence *solely* relevant to the determination of punitive damages when a jury must determine liability and compensatory damages. No such evidence was admitted here. Indeed, the article on which Temple primarily relies – Steven S. Gensler, PREJUDICE, CONFUSION, AND THE BIFURCATED CIVIL JURY TRIAL: LESSONS FROM TENNESSEE, 67 Tenn. L. Rev. 653 (2000) – examines results in a state whose laws specifically require that punitive liability be tried with compensatory damages. *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992). In any event, that article makes a policy argument, not a constitutional argument.

Fifth, the cases cited by Temple on pages 14 and 15 of its certiorari petition further demonstrate the lack of constitutional dimension to Temple's complaints. Not one of these cases even remotely suggests that bifurcation represents a constitutional mandate or anything other than a trial management issue. They also involve issues unrelated to this case. In *Burke v. Deere & Co.*, 6 F.3d 497 (8th Cir. 1993), the appellate court set aside a compensatory damages verdict because, *inter alia*, the jury had heard evidence of the defendant's net worth and that evidence tainted the compensatory verdict. In *Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888 (Miss. 2006), the appellate court ordered a new trial because the trial court had failed to comply with the Mississippi statute requiring bifurcation of punitive damages and hence the jury heard evidence about the defendant's net worth. These cases both involve the introduction of net worth damages in the compensatory phase – something that did not

happen here. In *Francis v. Coughlin*, 755 F. Supp. 618 (S.D.N.Y.), a district court ordered a new trial on damages because there was overwhelming evidence of juror confusion. There was no such evidence here and Temple's argument on that subject has been rejected multiple times under Pennsylvania law.

Sixth, the federal courts themselves view whether and how to bifurcate a civil trial as matters for trial court discretion. "Our approach to the issue as a matter of federal law has been to favor bifurcation of the amount of punitive damages as the preferred method, but to leave the mode of trial ultimately to the discretion of the district judge." *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 283 (2d Cir. 1990) (citation omitted). Federal courts exercise this discretion with the understanding that proper instructions will be heeded by the jury. *See Weidmer v. International Flavors & Fragrances*, No. C05-4138-MWB, 2007 WL 1959103 (N.D. Iowa. July 3, 2007) (citing *Francis v. Franklin*, 471 U.S. 307, 316 n.9 (1985); *Opper v. United States*, 348 U.S. 84, 95 (1954)); *see also Kociemba v. G.D. Searle & Co.*, 683 F. Supp. 1577 (D. Minn. 1988). It would be strange for the federal courts to view bifurcation as a matter for trial court discretion in federal cases, but as a matter of constitutional moment for state cases. Temple offers no support for any such suggestion.

Under all of these circumstances, there is no merit to Temple's notion that the ordering of evidence and argument in this case represented not just an error, but one of such magnitude that it equates in constitutional significance to the deprivation of the right to counsel and qualifies as a

"structural error" under *Fulminante*. This never-before raised argument has been constructed solely for the purpose of this certiorari petition. The argument is substantively wrong, has not been even been addressed in other cases, and does not warrant this Court's review.

IV. Temple's argument regarding the "presumption" of harmlessness is not worthy of this Court's review.

Temple's final argument is that even if there were no "structural error" under *Fulminante*, the *State Farm* violation that occurred during trial was improperly handled by the Pennsylvania courts because those courts failed to place the burden on Plaintiffs of demonstrating that no prejudice occurred as a consequence of the error. Cert Pet. 16-17.

This argument does not warrant certiorari for several reasons. First, it is predicated on the notion that a *State Farm* violation occurred during the trial, a notion that fails for the reasons discussed above.

Second, Temple does not cite even a single instance in which *Chapman* or *Fulminante* have been applied or otherwise discussed in the context of a typical civil action. They cite several cases in which federal courts apply a version of the *Chapman* standard when undertaking habeas corpus review of state criminal convictions. Habeas review is technically a civil proceeding, but it is directed to determining whether a person should remain in custody and has nothing to do with civil liability for

tortious conduct. *See O'Neal v. McAninch*, 513 U.S. 432, 440 (1995) ("Unlike the civil cases cited by the States, the errors being considered here by a habeas court occurred in a criminal proceeding, and therefore, although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake."). It should also be noted that *O'Neal* addressed whether a judge should grant a habeas corpus petition when the judicial mind is in "virtual equipoise" as to the harmlessness of a trial error. In the instant case, the Superior Court has not struggled with its decision. It twice found a total absence of prejudice and did not even publish its opinions.

Temple cites one other case in which *Chapman* was cited. *See A.B. v. Y.Z.*, 878 A.2d 807 (N.J. 2005). There, a teacher was deprived of a Sixth Amendment Confrontation Clause right to confront her accuser in a tort suit brought by a student against the teacher for sexual abuse. The student had been permitted to testify via closed-circuit television, but it was determined that the Sixth Amendment required the student's presence in the courtroom. Although the burden to demonstrate harmlessness now lay on the student, the New Jersey Supreme Court still concluded that the error was harmless because defense counsel subjected the student to a complete cross-examination and because of the judicial discretion to control the presentation of evidence. *See id.* at 812. Needless to say, the instant case does not involve a Sixth Amendment violation or anything like it.

Third, as in *A.B. v. Y.Z.*, and in contrast to *O'Neal*, this case does not present close issues that might turn on which party has the "burden of proof." The Superior Court twice has found that there was no error in the admission of the evidence of Temple's post-malpractice conduct, no error in the argument based upon that evidence, and no resulting prejudice given that (1) Temple had waived any objections to purported error, (2) the jury was not instructed on punitive liability or damages in the compensatory phase, (3) the jury did not decide punitive liability or damages in the compensatory phase, (4) the jury was specifically instructed that they were not there to punish anyone, and (5) the compensatory verdict was for millions less than the evidence would have permitted. App. 2a, 11a. Under these circumstances, the outcome would be the same even if Plaintiffs had the burden of showing harmlessness.

CONCLUSION

Temple proposes that this Court review the unpublished opinions of an intermediate state appellate court regarding a manufactured issue that is not the subject of conflicting judicial opinions because no cases have even discussed it. The petition does not present an issue worthy of this Court's review. The petition should be denied.

Respectfully submitted,

SHANIN SPECTER
Counsel of Record
ANDREW S. YOUMAN
CHARLES L. BECKER
KLINE & SPECTER,
A PROFESSIONAL CORPORATION
1525 Locust Street, 19th Floor
Philadelphia, PA 19102
(215) 771-1000